No. 07-144

SEP 6 - 2007

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEANNETTE A. BISNO and
ROBERT H. BISNO INDIVIDUALLY; and
DOES 1 THROUGH 25, INCLUSIVE,

Petitioners,

v.

NORTH BEVERLY PARK HOMEOWNERS
ASSOCIATION, INC., A CALIFORNIA
NON-PROFIT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record

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QUESTION PRESENTED

After all appeals have been exhausted and a judgment is final, can a litigant seek discovery of the trial judge's mental capacity where there is no evidence in the record that the trial judge was incompetent?

CORPORATE DISCLOSURE

North Beverly Park Homeowners Association, Inc. is a California non-profit mutual benefit corporation. It does not have a parent corporation.

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JURISDICTION

In this instance, Petitioners contend that the state court's denial, after final judgment, of their request to conduct discovery of the trial judge's mental competency at the time of trial presents an important question of federal law. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1953), decided under Supreme Court Rule 10's predecessor, Rule 19, the U.S. Supreme Court set forth the following standard:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Id. at 74.

In this case, following Petitioners' unsuccessful appeal of a three-week bench trial and after all appeals had been exhausted and the remittitur issued, Petitioners sought to either dissolve the judgment for permanent injunction or, in the alternative, depose the trial judge's wife and medical practitioners on the ground that the judge may have been mentally incompetent at the trial. Petitioners never complained or raised any concerns about Judge Nelson's competency (a) during any of the numerous law and

motion matters that preceded trial; (b) during the three-week trial; (c) during any of the post-trial motions; (d) during the initial appeal which resulted in a complete affirmance of Judge Nelson's decision; or (e) during their unsuccessful petition to the California Supreme Court to review the first decision of the California Court of Appeal.

The state trial and appellate court reviewed the trial transcript and found no evidence that the trial judge had been mentally incompetent or mentally impaired in any way and, accordingly, did not vacate the judgment or permit depositions of the judge's wife and medical practitioners. The granting of a writ is not warranted merely to review the evidence or inferences that can be drawn from the evidence. *General Talking Pictures Corp. v. Western Electrical Co.*, 304 U.S. 175, 178 (1937).

In short, this case presents a factually unique situation that is essentially of importance only to Petitioners and presents no real federal question. Since review on a writ of certiorari is not a matter of right but of discretion. *(Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951)), the petition should be denied.

STATEMENT OF THE CASE

A. The filing of the complaint

On June 5, 2002, Respondent initiated this action to enjoin J. Bisno (who at the time was the sole owner of Lot 66) from installing gates at her property without approval of the ARC. [I Appellants' Appendix ("A.A.") 1-163.] Respondent subsequently named R. Bisno as a Doe Defendant.

B. Trial

A bench trial commenced on Respondent's complaint and supplemental complaint on March 8, 2004 and concluded on March 30, 2004. Appellants' cross-complaint in the action and complaint in Case No. BC 288585 was severed prior to trial. Judge Nelson issued a Statement of Intended Decision on April 2, 2004. [III A.A. 394-97.]

C. Petitioners dismiss their cross-complaint

On April 5, 2004, Petitioners filed their dismissal of the cross-complaint in the action. [App., *infra*, 1a.][1]

D. Judgment for Permanent Injunction is entered

On April 29, 2004, Judge Nelson entered Judgment for Permanent Injunction. [III A.A. 398-408. App., *infra*, 6a.] *There was no cross-complaint pending at the time the Judgment was entered.* Thereafter, Judge Nelson, in response to Respondent's motion for attorneys' fees and Petitioners' motion to tax costs, awarded Respondent $275,000 in attorneys' fees and costs.

E. Notice of Appeal

On May 3, 2004, Petitioners filed a Notice of Appeal of the Statement of Intended Decision. On July 6, 2004, Petitioners filed a Notice of Appeal of the Judgment for Permanent Injunction. The Appeal sought reversal of the Judgment on the grounds that Judge Nelson misapplied

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[1] The Appendix to this Petition will be cited hereinafter as "(App., *infra*, ___ a)."

the law and made findings of fact that were not supported by substantial evidence. [III A.A. 409-38.] Although Petitioners obviously raised every argument they could think of, *the one argument they failed to make was that Judge Nelson was incompetent.*

F. First Appellate Decision

On June 21, 2005, the Court of Appeal, Second Appellate District, Division Four, affirmed the trial court's Judgment in its entirety. [III A.A. 409-38. App., *infra*, 14a.] The Court noted that Petitioners were appealing from the judgment for permanent injunction. The Court of Appeal rejected each of Petitioners' issues of error and affirmed the Judgment in all respects. On September 21, 2005, the California Supreme Court denied Petitioners' Petition for Review [III A.A. 439.] The remittitur issued on October 13, 2005. [III A.A. 440.] All appeals having been exhausted, the Judgment for Permanent Injunction was a final judgment.

G. Petitioners file the Statement of Disqualification and Motion to Dissolve the Permanent Injunction after the Remittitur is issued

On November 30, 2005, Petitioners filed a Statement of Disqualification (the "Statement"). [III A.A. 441-44.] Thereafter, on December 8, 2005, Petitioners filed its initial Motion to Dissolve the Injunction, which was subsequently amended [III A.A. 446-64, III A.A. 515-79.]

On January 25, 2006, the Honorable Michael L. Stern (the "trial judge"), after considering Petitioners' papers and Respondent's opposition [I R.A. 001-299; II R.A. 300-599 and III R.A. 600-96], denied the Motion to Dissolve the

Injunction, dissolved the stay of enforcement of judgment for permanent injunction and granted Respondent's Motion for Attorneys' Fees on Appeal. [R.T. 1-23.] The Orders Denying the Motion to Dissolve Perm. nent Injunction and Dissolving Stay were entered on February 1, 2006. [III R.A.750-58 and 734-41.] Judgment for Appellate fees and costs was similarly entered on February 1, 2006. [III R.A.742-49.]

H. The Second Appeal

Thereafter, Petitioners filed another Notice of Appeal of the order after judgment denying Petitioners' request to dissolve the judgment for permanent injunction. On February 13, 2007, the California Court of Appeal denied Petitioners' appeal.

REASONS FOR DENYING THE PETITION

Petitioners sought to void the judgment for permanent injunction on two bases:

1. Petitioners sought retroactive disqualification of the trial judge under California statutory law.

2. Petitioners sought to dissolve the judgment for injunction based on California Civil Code Section 3424(a), which vests the trial court with discretion to dissolve a final injunction where (1) there has been a material change in the facts upon which the injunction was granted; (2) the law upon which the injunction was granted has changed; or (3) the ends of justice would be served by the modification or dissolution of the injunction.

The California Court of Appeal, following California judicial precedent, concluded that the California statutory disqualification statutes do not provide for disqualification of a judge after a final judgment is rendered. The Court of Appeal correctly interpreted California law.[2] With respect to Petitioners' motion to dissolve the injunction under Section 3424(a), the Court of Appeal concluded that Petitioners failed to meet their burden of proof under Section 3424(a). The Court of Appeal reviewed the trial transcript and notably found that "not a single instance of erratic conduct or material loss at trial suggesting incapacity is mentioned." It concluded that the trial court did not abuse its discretion in finding that there was no competent evidence that the trial judge was incompetent during trial. The California Court of Appeal held: "there is nothing in the record of the trial that reasonably tends to show that the judge was suffering from a disqualifying mental disability." Finally, the California Court of Appeal affirmed the trial court's denial of request for discovery on the ground that Petitioners made no showing to reasonably suggest that a mental "infirmity infected the issuance of the permanent injunction."

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[2] Before the judgment was rendered, the cross-complaint was dismissed. The judgment was a final, appealable judgment. *See, e.g., Crocker-Anglo Nat'l Bank v. Kuchman*, 194 Cal. App. 2d 589 (1961) (appeal from nonsuit on complaint premature where cross-complaint is pending). In addition, the judgment became final for all purposes after the remittitur was issued.

A. Collateral Evidence Of Judge Nelson's Possible Impairment Standing Alone Is Insufficient As A Matter Of Law

The Court of Appeal found from the trial transcript that Judge Nelson was competent. Petitioners contend that self-serving statements from disgruntled attorneys from other proceedings claiming that Judge Nelson evidenced impairment in those cases, despite the evidence that Judge Nelson showed no impairment in this case, should warrant depositions of the judge's wife and doctors. The only legal authority that addresses this specific issue stands for the proposition that *the beginning point of the analysis must be the record from the challenged proceedings.* Absent evidence supporting a claim of impairment from that record, the trial court cannot allow discovery of the trial judge's mental condition.

In *United States of America v. State of Washington,* 98 F.3d 1159 (9th Cir. 1996), *cert. denied, Duwamish Indian Tribe v. United States*, 522 U.S. 806 (1997), a case remarkably similar to this case, the Ninth Circuit affirmed the district court's denial of a motion to vacate a 1979 judgment entered against various Indian tribes on the ground that the trial judge may have suffered from Alzheimer's disease in 1979. In 1992, eight years after the trial judge died, the Seattle Post-Intelligencer published an article which reported that the judge had suffered from Alzheimer's disease at the time of his 1979 judgment. Apparently, the judge's death certificate stated that the onset of Alzheimer's disease occurred in 1978, one year prior to the judgment under attack. The newspaper article quoted the judge's son, who stated that the judge went into a state of deterioration after February 1978 but that he believed that his father was mentally competent when he

rendered the 1979 decision at issue. In February 1978, the judge underwent surgery for an aortic aneurysm. By February 1979, he informed all counsel that in light of his physical health, he had requested that the Chief Judge remove him from the case. The Indian tribes, however, requested that the judge rule on their treaty.

The 1979 decision was affirmed by the Ninth Circuit which concluded that the judge had applied an incorrect legal test but that in applying the correct test, the evidence supported the judge's findings of fact. The Ninth Circuit affirmed the judgment because "'the district court correctly resolved this question despite its failure to apply the proper standard.'" *Id.* at 1162.

The Indian tribes later filed a motion for relief from the 1979 judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), which permits a party to seek relief from a final judgment for any reason justifying relief from the operation of the judgment.

The Indian tribes wanted to conduct discovery into the state of the judge's mental health at the time he rendered his 1979 decision. The district court denied the motion on three grounds:

> First, courts should avoid disturbing the public interest in the finality of judgments. Second, a ruling for the Three Tribes would open the floodgates to future challenges to judgments on grounds of judicial incompetence. Third, the Three Tribes suffered no 'manifest injustice' because the magistrate judge and the Ninth Circuit reached the same conclusion as Judge Boldt.

Id. at 1162-63.

In affirming the trial court's denial of the Indian Tribes' Rule 60(b)(6) motion, the Ninth Circuit stated:

> The Three Tribes argue that 60(b)(6) relief should be granted and discovery allowed because of the *possibility* that they were denied a competent fact-finder when their treaty status was decided by Judge Boldt. This is not one of those rare cases where "extraordinary circumstances" warrant vacating an "erroneous judgment." The Three Tribes offer only Judge Boldt's death certificate and the Seattle Post-Intelligencer Article to support their contention that Judge Boldt *may* have suffered some mental impairment in 1997. The death certificate states that Judge Boldt was diagnosed with Alzheimer's sometime in 1978. In the newspaper article Judge Boldt's son says that his father was a changed man after his 1978 surgery, but that he was mentally competent when he decided the tribes' treaty status. The correspondence from Judge Boldt shows that the judge knew his surgery had physically weakened him and that he also knew of his obligation to decide the tribes' treaty status. When he felt unable to fulfill his commitment to decide the tribes' status "within the next several months," he asked [the Chief Judge] to remove him from the case. The tribes responded by requesting that Judge Boldt rule on their status before stepping down. . . . We should not reopen a judgment under these circumstances. *Moreover, this court, as well as a magistrate judge, closely examined the case and reached the same conclusion as Judge Boldt. . . . The district court did not abuse its discretion in denying the Three Tribes' motion to reopen the judgment and allow discovery.* (Emphasis added)

Id. at 1163-64.

Similarly, in *People v. Pratt*, 205 Cal. App. 2d 838 (1962), a party challenged a judgment claiming that the trial judge's blindness deprived that party of a fair trial. The California Court of Appeal made clear that even assuming a disability, the key issue is whether *on the basis of the record*, the party challenging the decision was able to demonstrate that the trial judge was unable to try the case. In rejecting the claim, the court of appeal stated:

> [T]here is nothing *in the record* before us which shows or give rise to a reasonable inference that the trial judge was "by reason of permanent or temporary physical impairment" including blindness "unable to properly perceive the evidence or properly conduct the proceedings" in the instant case.

Id. at 841.

The court of appeal concluded:

> The defendant had a full and fair trial and an opportunity with the assistance of counsel to prepare and present his defense. We therefore find nothing under these particular facts which denied him due process. Assuming the judge's impairment of vision, *we cannot conclude on this record that by reason thereof he was unable to properly perceive the evidence or properly conduct the proceedings*. (Emphasis added)

Id. at 845-46.

Once again, just like in *People v. Pratt,* the starting and ending point in the analysis is the trial court record. Unless the record reveals prejudice resulting from an alleged impairment, the judgment is upheld and no discovery of the judge's mental condition is permissible.

Under Petitioners' analysis, any judgment may be challenged after the fact regardless of the objective indicia of a judge's competence if the losing party learns facts regarding a judge's personal life that would cause him or her to argue, without any evidentiary foundation, that "perhaps" the judge was not perceiving the evidence because his mind was elsewhere. There are many situations, other than a permanent medical condition, that *might* impact a trial judge's ability to concentrate during trial. The trial judge could have recently lost a loved one or be in the middle of a divorce proceeding or suffering from some business reversal. All those situations could arguably distract a trial judge.

To the extent Petitioners' position were adopted, as noted in *United States of America v. State of Washington*, there would be floodgate of litigation. If all a litigant had to show in order to challenge a ruling was that at the time of the trial, there were external factors that might have impacted on the trial judge's ability to focus on the trial without having to cite examples of impairment from the trial transcript, no judgment would be secure.

In this instance, the California Court of Appeal reviewed the transcript of the trial and concluded that there was no evidence that Judge Nelson was impaired in his conduct of the trial.

Petitioners contend that the trial court erred in denying their request to conduct discovery regarding Judge Nelson's competence. In this case, discovery would be totally irrelevant. As indicated in *United States of America v. State of Washington*, there must be a threshold showing of impairment evident from the record. That is especially true when a judgment withstands a complete

review on appeal. Regardless of what the discovery revealed about Judge Nelson's mental condition at the time of trial, as a matter of law, unless Petitioners met the threshold showing (evidence of mental impairment from the trial transcript), there would be no basis for dissolving the injunction. Therefore, the trial court and the California Court of Appeal, having reviewed the trial transcript and having concluded that there was no evidence of mental impairment, did not deprive Petitioners of any due process rights in denying discovery.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP
DENISE M. PARGA
MARC E. ROHATINER

Attorneys for Respondent, North Beverly Park Homeowners Association

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name and Address*):	TELEPHONE NO.:	*FOR COURT USE ONLY*
James B. Hicks (SBN 109117) Ervin, Cohen & Jessup LLP 9401 Wilshire Blvd., Ninth Floor Beverly Hills, CA 90212 ATTORNEY FOR (*Name*): Defendant and cross-complainants Robert Bisno and Jeannette Bisno	(310) 273-6333	
Insert name of court and name of Judicial district and branch court, if any: Los Angeles County Superior Court Central District		
PLAINTIFF/ PETITIONER: North Beverly Park Homeowners Association, Inc. **DEFENDANT/ RESPONDENT:** Jeanette Bisno et al.		
REQUEST FOR DISMISSAL ☐ **Personal Injury, Property Damage, or Wrongful Death** ☐ **Motor Vehicle** ☐ **Other** ☐ **Family Law** ☐ **Eminent Domain** ☒ **Other (*specify*):** Trespass, Breach, etc.		**CASE NUMBER:** BC 275 041 (Consolidated with case no. BC 288 585)

— A conformed copy will not be returned by the clerk unless a method of return is provided with this document. —

1. **TO THE CLERK:** Please dismiss this action as follows:

   a. (1) ☐ With prejudice (2) ☒ Without prejudice
   b. (1) ☐ Complaint (2) ☐ Petition
   (3) ☒ Cross-complaint filed by (*name*): Jeanette A. Bisno and Robert H. Bisno on (*date*): March 5, 2004
   (4) ☐ Cross-complaint filed by (*name*): on (*date*):
   (5) ☐ Entire action of all parties and all causes of action
   (6) ☒ Other (*specify*): Third amended and supplemental cross-complaint for damages, filed by Jeannette A. Bisno and Robert H. Bisno on March 5, 2004, as for all cross-defendants

Date: April 5, 2004

/s/ James B. Hicks
(TYPE OR PRINT NAME OF
☒ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

/s/ ▸ James B. Hicks
(SIGNATURE)
Attorney or party without attorney for:

* If dismissal requested is of specified parties only, of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

☐ Plaintiff/ Petitioner ☐ Defendant/ Respondent
☒ Cross-complainant

2. **TO THE CLERK:** Consent to the above dismissal is hereby given.**

Date:

_____ ▶ _____

(SIGNATURE)

(TYPE OR PRINT NAME OF
☐ ATTORNEY
☐ PARTY WITHOUT ATTORNEY)

Attorney or party without attorney for:

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

☐ Plaintiff/ Petitioner ☐ Defendant/ Respondent

☐ Cross-complainant

(*To be completed by clerk*)

3. ☒ Dismissal entered as requested on (*date*): Apr. 5, 2004
4. ☐ Dismissal entered on (*date*): as to only (*name*):
5. ☐ Dismissal not entered as requested for the following reasons (*specify*):
6. ☐ a. Attorney or party without attorney notified on (*date*):
   b. Attorney or party without attorney not notified Filing party failed to provide
      ☐ a copy to conform
      ☐ means to return conformed copy

JOHN A. CLARKE, CLERK

Date: Apr. 5, 2004 Clerk, by /s/ [Illegible] , Deputy

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)
)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9401 Wilshire Boulevard, Ninth Floor, Beverly Hills, California 90212.

On April 5, 2004, I served the foregoing document on the interested parties in this action by placing [] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Denise Parga, Esq. (courtesy copy by fax)
Wolf, Rifkin, Shapiro & Schulman, LLP
11400 West Olympic Blvd., 9th floor
Los Angeles, CA 90064-1557

[X] BY MAIL

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] BY FAX

I faxed such documents pursuant to Los Angeles County Rules of Court, Section 520(c)(4), to the fax number(s) listed on the attached service mailing list; and [ ] By placing true copies thereof enclosed in sealed envelope(s) addressed as stated on the attached service mailing list.

[ ] BY PERSONAL SERVICE

I caused **FIRST COURIER SERVICE** to personally deliver such envelope by hand to the offices and/or residence of the address(es) as indicated on the attached list.

Executed on April 5, 2004, at Beverly Hills, California.

/s/ James B. Hicks
James B. Hicks

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation, Plaintiff, vs. JEANNETTE A. BISNO, an individual; and DOES 1 through 25, Inclusive, Defendants.	Case No.: BC 275041 (Consolidated with Case No. BC 288585) [Assigned to the Honorable Rodney Nelson – Dept. 46] Complaint Filed: June 5, 2002 [~~PROPOSED~~] **JUDGMENT FOR PERMANENT INJUNCTION** (Filed Apr. 29, 2004)
ROBERT H. BISNO, Plaintiff, vs. NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC. and DOES 1-10, Inclusive, Defendants.	

This action came on regularly for trial on March 8, 2004 in Department 46 of the above-entitled court, Honorable Rodney Nelson, judge presiding. Plaintiff North Beverly Park Homeowners Association appeared by its attorneys Marc E. Rohatiner and Denise M. Parga of Wolf, Rifkin, Shapiro & Schulman, LLP and defendants Jeanette Bisno and Robert Bisno appeared by their attorneys, Marshall G. Mintz of Mintz & Werner and James

Hicks and Andres Quintana of Erwin, Cohen & Jessup, LLP.

Evidence, both oral and documentary having been presented by both parties, the Court having conducted a site view of the properties in question, the cause having been argued and submitted for decision, the Court having issued its Statement of Intended Decision, the Court finds that:

1. The Architectural Review Committee (the "ARC") is a duly constituted committee of North Beverly Park Homeowners Association (the "Association").

2. In undertaking the acts referred to herein,

(a) the ARC acted within the authority granted it by the Association's Declaration of Conditions, Covenants & Restrictions (the "CC&Rs"):

(b) the ARC acted in the best interests of the community and not in an arbitrary manner;

(c) the ARC followed its own standards and procedures prior to seeking injunctive relief;

(d) Those standards and procedures were reasonable.

3. Section 25.03 of the CC&Rs required the Bisnos to submit plans and specifications showing the "nature, kind, shape, height, width, color, materials and locations" of the sculpture and obtain written approval from the ARC prior to its installation in the motor court of 66 Beverly Park, Beverly Hills, California (the "Bisno property").

4. The Bisnos never submitted a writing which described the "nature, kind, shape, height, width, color,

materials and locations" of the sculpture prior to the institution of this action.

5. The Bisnos installed the sculpture in the motor court of the Bisno property in violation of the CC&Rs.

6. On April 12, 2004, in accordance with the Statement of Intended Decision, the ARC considered and disapproved the sculpture in the motor court of the Bisno Property.

7. The ARC's disapproval of the location of the sculpture in the motor court was reasonable, undertaken in good faith and not in an arbitrary or discriminatory manner and in the best interest of the community.

8. The Bisnos submitted a drawing of the main and secondary gates to the ARC.

9. On October 23, 2001 and on December 4, 2001 the ARC disapproved the gate design.

10. After the disapproval was communicated to the Bisnos, the Bisnos fabricated the disapproved gates.

11. The ARC was willing to accept the fabricated gates with modest revisions.

12. The Bisnos installed the disapproved gates without making the modest revisions.

13. On April 12, 2004, in accordance with the Statement of Intended Decision, the ARC disapproved the gates as installed and requested that the Bisnos revise the gates within sixty (60) days.

14. The revisions requested by the ARC are modest and reasonable.

15. The ARC's decision with respect to the requested revisions of the gates was reasonable, undertaken in good faith and not in an arbitrary or discriminatory manner and in the best interest of the community.

16. The Bisnos acknowledged in trial that the ARC had the authority to disapprove the Bisnos' installation and maintenance of the trash cans in the Private Streetscape area.

17. The Bisnos moved the trash cans out of the Private Streetscape area during the course of the trial.

18. Therefore, the Association's request for an injunction mandating that the Bisnos move the trash cans was moot.

19. The ARC acknowledged prior to trial that the ficus hedge in front of the dinosaur had grown to a sufficient height to screen the dinosaur and that if the hedge were maintained at that height, the ARC would accept the dinosaur.

20. As a result, the Association withdrew its request for an injunction with respect to dinosaur prior to trial.

21. The Association had requested that the Bisnos replace certain trees that were dead or dying and complete its landscape plan in the front of the Bisno property.

22. After the Association sought injunctive relief with respect to the landscaping, the Bisnos installed two of the missing trees and installed a sump pump to address the condition of the dead or dying trees.

23. Accordingly, the Association's request for injunctive relief with respect to the landscaping was moot.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are ordered to move the sculpture currently located in the motorcourt of 66 Beverly Park, Beverly Hills, California (the "Bisno property") to the backyard of the Bisno property or to another location on the Bisno property where the sculpture will not be visible from the street no later than June 11, 2004, sixty (60) days after the ARC disapproved the location of the sculpture.

2. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are permanently enjoined from installing a design element in the motorcourt of the Bisno property that is not approved by the ARC.

3. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or for them are ordered to remove the main and secondary gates on the Bisno property no later than June 11, 2004, sixty (60) days after the ARC disapproved the main and secondary gates, as currently installed.

4. Robert Bisno, Jeanette Bisno and their agents, servants, employees, and co-owners and/or anyone working with defendants Robert Bisno and/or Jeanette Bisno, and all persons acting in concert or participating with or

for them are permanently enjoined from installing main and secondary gates that are not approved by the ARC.

5. The ARC and its agents, servants, employees are ordered to respond to all applications submitted by the Bisnos pursuant to Section 25.03 of the CC&Rs within 40 days of receipt.

IT IS HEREBY FURTHER ORDERED that North Beverly Park Homeowners Association is the prevailing party on the complaint and is entitled to $275,000.00 as its costs.

DATED: April 29, 2004

/s/ Rodney E. Nelson
THE HONORABLE RODNEY NELSON

Submitted by:

WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP

By: /s/ Denise M. Parga
DENISE M. PARGA
Attorneys for NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11400 West Olympic Boulevard, Ninth Floor, Los Angeles, California 90064-1582.

On April 19, 2004, I served the foregoing document described as **JUDGMENT FOR PERMANENT INJUNCTION** on the interested parties in this action by placing [ ] the original [✓] a true and correct copy thereof enclosed in an envelope addressed as set forth on the attached page.

[X] **BY MAIL.** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[ ] **BY OVERNIGHT EXPRESS DELIVERY.** I deposited it in a box or other facility regularly maintained by Overnite Express, or delivered it to a driver or courier authorized by Overnite Express to receive documents, in an envelope designated by Overnite Express, with delivery fees provided for, and with delivery requested for the next business day.

[X] **BY FACSIMILE.** On April 19, 2004, between the business hours of 9:00 a.m. and 5:00 p.m. and as more specifically set forth on the facsimile confirmation sheet) attached hereto, I served the foregoing document described as _____ by facsimile, from facsimile number (310) 479-1422, to the interested party(ies) in this action at the facsimile number(s) as set forth on the facsimile cover sheet(s) attached hereto. The parties hereto have agreed in writing to accept facsimile service.

Executed on April 19, 2004, at Los Angeles, California.

[X] (**State**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (**Federal**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

L. Henry
(print or type name)

/s/ L. Henry
(signature)

SERVICE LIST
N. Beverly Park HOA v. Bisno
LASC Case No. BC 275041

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, Plaintiff and Respondent, v. JEANNETTE A. BISNO, et al., Defendants and Appellants.	B175173 (Los Angeles County Super. Ct. No. BC275041) (Filed Jun. 21, 2005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rodney E. Nelson, Judge. Affirmed.

Ervin, Cohen & Jessup and James B. Hicks; Mintz & Werner and Marshall G. Mintz for Defendants and Appellants.

Wolf, Rifkin, Shapiro & Schulman, Marc E. Rohatinger and Denise M. Parga for Plaintiff and Respondent.

North Beverly Park, a common interest development governed by the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350, et. seq.), is a luxury community located in Beverly Hills.[1] It encompasses more than 300 acres divided into 64 residential lots. Under the

[1] All undesignated section references are to the Civil Code.

Declaration of Covenants, Conditions and Restrictions, it is managed by the North Beverly Park Homeowners' Association ("the Association"). The Architectural Review Committee ("the ARC") has discretion to approve or disapprove proposed improvements visible from the lot boundaries. In April 1999 Robert and Jeannette Bisno purchased a vacant lot in North Beverly Park, and planned to build a residence. Disputes arose over the ARC's disapproval of certain elements of the Bisnos' construction plans, and the Association ultimately filed suit against the Bisnos. Following a non-jury trial, the trial court granted a permanent injunction requiring the Bisnos to remove a sculpture and front gates that were not approved by the ARC. The Bisnos appeal, and we affirm the trial court.

PROCEDURAL BACKGROUND

On June 5, 2002, the Association filed a complaint against Jeannette Bisno alleging that she was "[t]hreatening to install a front gate on the Property" which had been disapproved by the ARC.[2] The Association alleged causes of action for breach of covenants, nuisance, and trespass, seeking damages in excess of $5,000 and

[2] During the trial court proceedings, there was some uncertainty as to the ownership status of the property. The Bisnos purchased the lot as community property. For reasons unrelated to this case, Robert Bisno later conveyed the property to Jeannette. In early 2001 the Bisnos instituted divorce proceedings, and a dispute ensued over whether Robert retained a beneficial interest in the property or whether Jeannette was sole owner. By the end of September 2002 the dispute over ownership had been resolved, with Robert Bisno as the sole owner. At times the Association's pleadings named Jeannette Bisno alone as defendant, and at times they named both Robert and Jeannette.

injunctive relief Accompanying the complaint was a certification under section 1354, subdivision (c), that preliminary or injunctive relief was necessary. On June 5, 2002, the trial court granted the Association's ex parte application for a temporary restraining order prohibiting installation of the gates. On July 11, 2002, the court granted the Association's second ex parte application for a temporary restraining order to prohibit Jeannette and Robert Bisno from pouring the concrete driveway and installing a 17 foot sculpture in their front yard without ARC approval. Following hearing on an order to show cause, the court granted a preliminary injunction on January 17, 2003, prohibiting Robert Bisno from installing the gates or sculpture without ARC approval.

In August 2003 the trial court permitted the Association to file a Supplemental Complaint against Robert and Jeannette Bisno. The complaint alleged additional disputes between the Association and the Bisnos, including the Bisnos' alleged failure to complete the approved landscaping and to relocate trash cans, and their installation of a ficus hedge around a transformer and dinosaur topiary that had not been approved.

On October 31, 2003, some ten months after issuing the preliminary injunction, the court granted the Bisnos' motion to dissolve it. However, the court's ruling advised that the court had not determined the ultimate merits of the Association's suit. Sometime after dissolution of the preliminary injunction, the Bisnos installed both the gates and the sculpture.

Trial was held March 8 (a Monday) through March 26, 2004. The Friday before the beginning of trial, the Association waived its damage claims. The Bisnos' moved for

dismissal under section 1354, subdivision (b), arguing that Association, now seeking only injunctive relief, had failed to engage in alternate dispute resolution as required by section 1354, subdivision (b). The trial court denied the motion. At the conclusion of the trial evidence, the trial court, with the parties' consent, viewed the North Beverly Park community. On April 2, 2004, the trial court filed its Statement of Intended Decision, finding that the Association did not discriminate against the Bisnos in handling their construction plans. All alleged disputes between Bisnos and the Association were moot, except the installation of the sculpture and gates. On April 29, 2004, the court entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The Bisnos were further restrained from installing any gates or any item in their front motor court without ARC approval. The Bisnos appeal from the judgment (order granting the permanent injunction). (Code Civ. Proc., § 904.1, subd. (a)(6).)

EVIDENCE[3]

The Association's Case

As required by the Davis-Stirling Act (see §§ 1351, subd. (h), and 1353), North Beverly Park is governed by a Declaration of Covenants, Conditions and Restrictions ("the Declaration"). The Declaration creates the ARC to review all proposed improvements visible from the boundaries of the residential lots. Because the lot lines run

[3] Although the trial evidence covered other disputes between the Bisnos and the ARC, we summarize only the evidence relevant to the two items covered by the permanent injunction: the front gates and the sculpture.

to the middle of the street, the jurisdiction of the ARC includes improvements visible from that location. The ARC has three members (all North Beverly Park homeowners), and rules by majority vote. The specific grant of authority to the ARC is contained in section 25.03 of the Declaration, which states in relevant part: "No construction, alteration, addition, installation, modification, decoration, redecoration or reconstruction of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and locations of the same shall have been submitted to the ARC and approved in writing by the ARC. . . . The ARC shall not approve plans and specifications submitted for its approval if it deems, in its discretion, that the installation, construction, alterations or additions contemplated thereby in the locations indicated will be detrimental to the appearance of the surrounding area of the Project as a whole, that the appearance of any structure affected thereby will not be in harmony with the surrounding structures, and that the installation or construction thereof will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members, or that the upkeep and maintenance thereof will become a burden on the Association."

Section 25.11 of the Declaration provides that the ARC's approval or disapproval must be made "on the basis of (i) aesthetic considerations and the overall benefit or detriment which would result to the Project, (ii) the Project generally, (iii) the Basic Architectural Envelope, (iv) applicable law, and (v) this Declaration. The ARC shall

take into consideration the aesthetic aspects of the architectural designs, height, size, floor area, view impairment, and placement of structures, landscaping, color schemes, exterior finishes and materials, and similar features."

Christine Hazy, President of the Association, was a member of the ARC from 1999 through 2003. At times relevant to the Bisnos' proposed construction, Nahum Lainer and Steven Fortner were also members. All three denied that the ARC treated the Bisnos any differently than other homeowners in North Beverly Park.

In September 1999, the Bisnos' residential architect, Randy Hamerly, submitted an artist's rendering of the Bisnos' proposed residence. Among other things, the rendering depicted a fountain in the front motor court. In 2001 the Bisnos' landscape architect, Daniel Weedon, submitted construction plans that, consistent with the artist's rendering, called for a fountain in the motor court. On August 9, 2001, after these plans were submitted, Robert Bisno held a meeting with his design team (residential architect Hamerly and landscape architect Weedon) at which Bisno decided to eliminate the fountain in the motor court. Instead, he intended to install a large sculpture he had purchased in Paris, where it had been on display in front of the Ritz Carlton hotel. Bisno told Hamerly that he "expect[ed] the design review committee to have an unfavorable reaction."

The sculpture was created by Belgian sculptor Olivier Strebell, and is entitled, "*A Bras Ouverts*" (translated, "With Open Arms"). At more than 5 tons, it is a large, abstract depiction of a nude woman. The subject is posed on her back, lying on a pointed rock, arms dangling toward the ground, legs raised above the body.

By August 22, 2001, Bisno had provided Hamerly photographs of the work. Hamerly realized that because of its size, the sculpture would impede large vehicle traffic traveling around the motor court. He suggested alternative locations, but Bisno insisted that the sculpture be placed in the motor court. Therefore, the motor court had to be redesigned. If Hamerly were making the decision, he would not have selected the sculpture. It was different from other statuary visible from the street at other homes in the community. On the other hand, aesthetically Hamerly saw nothing wrong with juxtaposing the modern sculpture with the traditional architecture of the Tuscan villa the Bisnos were constructing.

Hamerly knew that the ARC would have to approve the sculpture. According to the ARC members, the ARC has the authority to approve or disapprove garden statues and fountains visible from the residential boundary. In reviewing such items, the ARC is most concerned with the location and appearance of the piece. When a statue, fountain or other element is installed without approval (and hence without an opportunity for advance review), the ARC inspects it to determine whether it meets the ARC's aesthetic guidelines. If it does, the ARC approves it. If it does not, the ARC asks the homeowner to remove it. Homeowners generally comply. The ARC gives oral approvals to already-installed improvements, and deems them valid, even though the Declaration calls for written approvals.

On November 20, 2001, Weedon (the landscape architect) submitted revised plans to the ARC. At the time, the Bisnos were proposing to build into the 25-foot setback established for the front yard. The purpose of these revised plans was to show changes required by that proposal. The

revised written plans depicted modifications of the front fence, walls, gates and pilasters.[4] Weedon listed these modifications in the space on the plans bearing the title, "Revisions." In the plan drawings he also marked the changes by "deltas" and "bubbles."[5] The plans also contained a change to the front motor court. They now described a "fountain *and/or sculpture*," as opposed to the "fountain" described on the earlier plans and depicted in the artist's rendering. This change was not listed in the space for revisions, and was not marked by deltas or bubbles.

The ARC reviewed the revised plans at a meeting in November 2001, attended by Robert Bisno, Hamerly, and Weedon. The ARC found the design for the front gates too ornate in proportion to their relatively small size – that is, because the gates were relatively small compared to other gates in the community, the detail appeared more ornate than those larger gates. The ARC requested a more simplified or subtle design. Otherwise, the ARC reacted favorably.

At this November 2001 meeting, neither Robert Bisno nor his design team mentioned the change to "fountain and/or sculpture" on the revised plans. Also, because they were examining the plans for the listed modifications required by building into the setback, the members of the ARC did not notice the change, and did not request any additional information about it. In any event, the gate design had not been finalized, and one of the subjects

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[4] "Pilasters" are the structures that support the gates.

[5] Changes in architectural design plans are generally indicated by the delta sign, and marked by bubble drawings on the plans.

under discussion was whether the gates would be screened from the street. Hence, it was uncertain whether a fountain or sculpture in the motor court would be visible from the street and subject to ARC jurisdiction. As construction progresses, generally the homeowner presents the ARC with detailed proposals for observable fountains and statuary.

On December 4, 2001, the ARC gave written conditional approval to certain items on the November 20 revised plans, but disapproved the gate drawings. The ARC requested a more simplified design for the gates. The ARC did not mention installation of a sculpture or fountain.

Robert Bisno responded by correspondence dated December 7, 2001, asserting (incorrectly) that the ARC had approved the gates. Thereafter the ARC repeatedly informed him that the gates were not approved, and that he would have to submit a simplified design. On December 19, 2001, Hamerly spoke to Robert Bisno by telephone. At that time, the gates had been designed, but not manufactured. Despite the ARC's rejection of the gate design, Bisno instructed Hamerly to have Jim Casey, the construction manager, proceed immediately to have the gates fabricated and installed as designed. Bisno told Hamerly, "It would take a court order to stop us."

On May 8, 2002, the ARC's attorney sent Robert Bisno a letter stating that the ARC was still awaiting the simplified gate design. On May 10, 2002, Bisno responded by letter, requesting that the Association's entire Board of Directors review the design. Such a review would have been unprecedented. On May 17, 2002, the ARC again informed Bisno by letter that he must submit a revised

gate design. When Bisno did not do so and appeared ready to proceed with the rejected design, the Association filed suit on June 5, 2002, to prevent installation of the gates.

A month or so later, in July 2002, the ARC first learned of Robert Bisno's intent to install the sculpture. Mary Williams, the Association's on-site manager, saw a large construction crane at the Bisnos' home site. Jim Casey, defendants' construction manager, told her that a sculpture was being delivered. Williams, who had been hired only weeks before, was unable to find any written approval for a sculpture. She later drove past the site, and observed the assembled sculpture. To her it appeared to be possibly some type of sea creature. Jim Casey told her the sculpture was 18 feet high, and would be installed in front of the house.

The members of the ARC viewed the sculpture before it was installed, and disapproved it. The sculpture was the most noticeable statuary in the community. Its size was inappropriate for its placement: too large for the motor court and house, too close to the street. Further, the work was aesthetically out of character for the community, very different in style and theme from any other artistic work.

After the trial court dissolved the preliminary injunction, the Bisnos installed the sculpture and gates. They were in place at the time of trial.

Defense Case

In June or July 2001, Robert Bisno observed the sculpture on display in the Place Vendome in Paris. He purchased it for $250,000, not thinking of the ARC. He

was overcome by the beauty of the sculpture, and did not imagine that the ARC would disapprove it.

By August 2001 Bisno decided to install the sculpture in the front motor court. This placement required modifications to the design of the motor court. Based on his difficult dealings with the ARC, Bisno came to believe that the ARC would not like the sculpture. However, he never instructed his design team to conceal information about it from the ARC. He did, however, decide to install the sculpture without ARC approval, because (based on conversations with counsel) he believed that the ARC did not have jurisdiction over it. After the court dissolved the preliminary injunction, Bisno installed the sculpture, understanding that the court might later require him to remove it.

Believing that the ARC dealt unfairly with the gate design, Bisno did not intend to comply with the ARC's request for a more simplified design. He decided to install the gates, and then "see if the ARC still believes . . . these are so terrible that they are worth a lawsuit." Before he could install them, the ARC filed suit. After the preliminary injunction was dissolved, Bisno installed the gates.

Both Weedon and Hamerly believed that the Bisnos were required to obtain approval from the ARC for installation of the sculpture. It was "standard practice" to submit a photograph or thawing depicting the materials, height, and design of a visible sculpture to the ARC. However, Bisno, Weedon and Hamerly provided no submission regarding the sculpture before it was delivered.

On the revised plans of November 2001, Weedon did not use a delta to mark the change from "fountain" to "fountain and/or sculpture," because he did not consider it

to be an important modification. Also, marking revisions with deltas is a method of indicating new work to be billed to the client, something that did not apply to installation of the sculpture. Bisno never instructed Weedon to conceal information about the sculpture from the ARC.

In Weedon's opinion, the gates were consistent with the iron work on the front door of the Bisnos' residence. He believed the gates were typical of others in the community, and nearly identical to those of another home. Hamerly, too, disagreed with the ARC's assessment that the gates were too ornate for their size, or more ornate than other gates in the community.

Weedon had performed work for 11 homeowners in North Beverly Park, and had worked as a consultant for the ARC. In his experience, the ARC had never taken as long as 90 days or six months to approve or disapprove construction plans. The proposed design of the Bisnos' home and related elements was consistent with the community, yet the ARC expressed a number of objections. The Bisnos' lot was prominent in the community, in that it was quite long and fronted a main street. Therefore, the ARC paid more attention to the details of the Bisnos' design than it did for other homeowners.

According to Lee Silver, called as an expert to offer an opinion on the ARC's handling of the Bisnos' construction, the ARC's delay in approving plans was unreasonable, and its treatment of the Bisnos was inconsistent with its treatment of other homeowners.

DISCUSSION

The Grant of Authority to the ARC is Valid

The Bisnos urge us to adopt a rule requiring homeowners' associations in common interest developments to publish specific written guidelines describing the type of improvements that will be permitted. Without such guidelines, the Bisnos argue, homeowners' associations should be precluded from obtaining injunctive relief to stop proposed improvements. The Bisnos' contention is, in substance, a challenge to the facial validity of the ARC's discretion to approve or reject construction visible from the street. We conclude that California law sanctions the broad grant of authority to the ARC, and decline to adopt the Bisnos' proposed rule.

Under section 25.03 of the Declaration, any construction or improvement visible from the residential lot boundary requires written approval from the ARC. Further, "The ARC shall not approve plans and specifications submitted for its approval if it deems, in its discretion, that the installation, construction, alterations or additions contemplated thereby in the locations indicated will be detrimental to the appearance of the surrounding area of the Project as a whole, that the appearance of any structure affected thereby will not be in harmony with the surrounding structures, and that the installation or construction thereof will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members." Section 25.11 provides that the ARC's approval or disapproval must be made "on the basis of (i) aesthetic considerations and the overall benefit or detriment which would result to the Project, (ii) the Project generally, (iii) the Basic Architectural Envelope, (iv) applicable law, and (v) this Declaration. The ARC shall

take into consideration the aesthetic aspects of the architectural designs, height, size, floor area, view impairment, and placement of structures, landscaping, color schemes, exterior finishes and materials, and similar features."

In common interest developments, California law permits delegation of broad discretion to make decisions restricting the use of property. Courts review such grants of authority under a deferential standard: they are "presumptively reasonable [citation], and are enforceable 'unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit' [citation]." *(Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 88, quoting *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380, 382 (*Nahrstedt*); see *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 975 (*Dolan-King*); see also § 1354, subd. (a).)

In the present case, the grant of discretion to the ARC in section 25.03 of the Declaration, supplemented by the standards of section 25.11, is not "wholly arbitrary." (*Nahrstedt, supra,* 8 Cal.4th at p. 382.) That is, it bears a "rational relationship to the protection, preservation, operation [and] purpose of the affected land." (*Id.* at p. 381.) "Maintaining a consistent and harmonious neighborhood character, one that is architecturally and artistically pleasing, confers a benefit on the homeowners by maintaining the value of their properties." (*Dolan-King, supra,* 81 Cal.App.4th at p. 976.) Moreover, California law specifically authorizes common interest developments to grant a committee broad, subjective discretion to reject proposed improvements on aesthetic, artistic, or similar grounds. (*Dolan-King, supra,* 81 Cal.App.4th at pp. 976-977; *Clark*

v. Rancho Santa Fe Assn. (1989) 216 Cal.App.3d 606, 618-620 (*Clark*); see Miller & Starr, California Real Estate (3d ed. 2001) § 25:115, pp. 268-269.) There is no requirement that specific aesthetic or design criteria be promulgated. Rather, the law requires simply that "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly." *(Nahrstedt, supra,* 8 Cal.4th at p. 383; see *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 37-38 *(Rancho Santa Fe Assn.)*; *Clark, supra,* 216 Cal.App.3d at p. 620.)

Nor does the grant of authority to the ARC violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. As recognized in *Dolan-King,* California law has "long upheld . . . general covenants vesting broad discretion in homeowners associations or boards to grant or withhold consent to construction. [Citations.] This is so even when the covenants contain such broad, general approval standards as "'"conformity and harmony of external design and general quality with the existing standards of the neighborhood"'" and "'"location of the building with respect to topography and finished ground elevations"'" as long as the covenants clearly granted such discretion." *(Dolan-King, supra,* 81 Cal.App.4th at p. 977.)

The Bisnos rely heavily on an Ohio appellate decision, *Prestwick Landowners' Assn. v. Underhill* (1980) 69 Ohio App.2d 45, 49. In *Prestwick* the court invalidated a covenant requiring pre-construction approval, as applied in that case, because the offending homeowners "had no guidelines at all in submitting their plans, and the Architectural

Committee had no guidelines at all as to accepting or rejecting them. In other words, there is too great a possibility here that the consent restriction can be exercised in an arbitrary, capricious, and unreasonable manner." (*Id.* at p. 49.) This reasoning is inconsistent with the deference California law gives to pre-construction approval provisions. A "possibility" that a review committee might exercise its discretion arbitrarily is not sufficient to overcome the presumption that the delegation of discretion is reasonable. There is simply no basis in California law to adopt the reasoning of the Ohio court in *Prestwick*.[6]

The Bisnos contend that their discriminatory treatment by the ARC compared to other homeowners shows that the grant of authority to the ARC is overbroad. As discussed below, we affirm the trial court's finding that the ARC did not discriminate against the Bisnos. In any event, "[r]estrictions found in a governing land use covenant 'are evaluated for reasonableness in light of "the restriction's effect on the project as a whole," not from the perspective of the individual homeowner. [Citations.] Accordingly, courts do not conduct a case-by-case analysis of the restrictions to determine the effect on an individual homeowner; we must consider the reasonableness of the restrictions by looking at the goals and concerns of the entire development.' [Citation.]" (*Rancho Santa Fe Assn., supra,* 115 Cal.App.4th at p. 38.) Giving the ARC broad authority to reject improvements that are not in "harmony with the surrounding structures," and that "detract from

[6] Defendants also cite other out-of-state decisions. We need not discuss them. The California standard governing the facial validity of pre-construction approval provisions is clear. The grant of discretion to the ARC clearly passes muster.

the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members," reasonably serves legitimate goals of North Beverly Park homeowners.

Substantial Evidence Supports the Permanent Injunction

To withstand judicial scrutiny, the ARC's rejection of the Bisnos' gates and sculpture must be reasonable and in good faith, not arbitrary or capricious. (*Nahrstedt, supra,* 8 Cal.4th at p. 383; *Clarke, supra,* 216 Cal.App.3d at p. 620.)[7] The Bisnos contend that the ARC subjected them to unreasonable, arbitrary, and discriminatory treatment. On conflicting evidence, the trial court found to the contrary. That finding must be upheld if supported by substantial evidence. "Generally, in reviewing a permanent injunction, we resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences that support the trial court's order. [Citation.] However, where the ultimate facts are undisputed, whether a permanent injunction should issue becomes a question of law, in which case the appellate court may determine the issue without regard to the conclusion of the trial court. [Citation.]" (*Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683, 688-689.)

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[7] Effective January 1, 2005, the Legislature enacted section 1378. Subdivision (a)(2) of that section provides that a homeowners' association's "decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious." The provision is declaratory of existing law, and does not affect the established standard of judicial review. (See West's Ann. Cal. Codes, Civ. Code, Vol. 8, 2005 Supp., p. 184, Law Rev. Comm. Comments (2004 ed.).)

To the extent the Bisnos contend that the ARC's handling of design elements other than the gates and sculpture was unreasonable and discriminatory as compared to other homes in North Beverly Park, the trial court implicitly rejected that conclusion, and the Bisnos fail to show an abuse of discretion. Moreover, the permanent injunction requires removal of the gates and sculpture. Only the ARC's handling of those elements of the Bisnos' plans are now in issue. Other matters, such house color, mailboxes, mechanical pits, and driveways, are largely immaterial as to whether the ARC acted reasonably in rejecting the design for the gates and the placement of the sculpture.

We begin with the sculpture. Substantial evidence supports the trial court's determination that the ARC acted reasonably. The ARC's decision rejecting the sculpture was based on two factors. First, the size and placement of the sculpture are inappropriate for the project design: that is, because of its large size, the sculpture is out of proportion to the motor court and the house, and too close to the street. Second, in the ARC's aesthetic judgment, the sculpture is out of character for the community. It is abstract, whereas other statuary in the development is traditional and conservative. Also, the sculpture depicts a naked woman in an unusual pose that at least one member of the ARC, Christine Hazy, found disturbing and suggestive of violence (she believed the subject is impaled on the pointed rock that forms the base). The Bisnos' own residential architect, Randy Hamerly, conceded that installation of the sculpture in the motor court required revised construction plans to accommodate traffic flow, and he proposed other locations. He also conceded that the sculpture was different from other statuary in the community. Had the

choice been his, he would not have selected the sculpture. Further, a review of the photographic exhibits depicting other statuary visible from the street reasonably supports the ARC's subjective decision that the sculpture, being entirely different from any other, is not in harmony with the community and "will detract from the beauty, wholesomeness and attractiveness of the Project or the enjoyment thereof by the Members." Thus, substantial evidence supports the trial court's conclusion that the ARC acted reasonably in disapproving the sculpture. (See *Rancho Santa Fe Assn., supra,* 115 Cal.app.4th at p. 43 [on conflicting evidence, substantial evidence standard applies to trial court's determination that Association acted reasonably].)

As for the gates, the ARC reasoned that other gates with similar designs in the community were larger, and that therefore the design of the Bisnos' gates was too ornate in proportion to their relatively small size. The ARC merely requested a more simplified or subtle design – a request first made before Robert Bisno chose to disregard the ARC's decision and have the gates manufactured and installed as originally designed. Given the ARC's broad discretion, the decision rejecting the gates and requesting a more simplified design is reasonably consistent with the appearance of other gates in the community as depicted in the trial exhibits. We also note that the trial judge viewed the community, and found no evidence of discrimination against the Bisnos. "The information obtained by this view was independent evidence that could be taken into consideration in determining the issues presented by the pleading; '[a]s independent evidence the judge's observations were of equal dignity to the other

evidence in the case; . . .' [Citation.]" (*Clark*, *supra*, 216 Cal.App.3d at p. 621.) We find substantial evidence supports a finding that the ARC acted reasonably in disapproving the gates, and merely asking for a more simplified design.

The Bisnos' contend that the ARC's application of its authority was inconsistent, because it did not always issue written approvals as required by section 25.03 of the Declaration, but rather gave oral approvals to some sculptures and fountains. The Association's evidence showed that when a statue, fountain or other element is installed without approval (and hence without an opportunity for advance review), the ARC inspects it to determine whether it meets the ARC's aesthetic guidelines. If it does, the ARC approves it, often orally. If it does not, the ARC asks the homeowner to remove it. Homeowners generally comply. This deviation from the requirement of written approvals contained in section 25.03 does not invalidate the ARC's rejection of the Bisnos' gates and sculpture. It does not show arbitrary or capricious application of the ARC's subjective discretion, but rather a procedural irregularity that in no way affected the ARC's handling of the Bisnos' sculpture and gates.

The Bisnos contend that the ARC rarely, if ever, institutes litigation against homeowners who violate use restrictions. The Bisnos believe that the instant litigation against them is evidence of discriminatory treatment. We find no evidence of arbitrary or capricious action in the filing of the present action. The event that led to this litigation was Robert Bisno's insistence on installing the gates, even though the ARC had expressly rejected the design. Despite the ARC's decision, in December 2001 Robert Bisno instructed Randy Hamerly to have Jim

Casey, the construction manager, proceed immediately to have the gates fabricated and installed as designed. Bisno told Hamerly, "It would take a court order to stop us." Bisno decided to install the gates, and then "see if the ARC still believes . . . these are so terrible that they are worth a lawsuit." Believing installation of the gates was imminent, the ARC filed suit in June 2002 to stop it. Although most homeowners accede to the ARC's request to remove improvements that do not meet ARC approval, Robert Bisno intended to disregard the ARC's decision unless stopped by court action. In this circumstance, the ARC's decision to file suit was not arbitrary or capricious.

The Bisnos Were Not Entitled to an Internal Disciplinary Proceeding

The Bisnos contend that before filing the instant action, the Association did not provide them with the notice and hearing required by section 23.01 of the Declaration. This failure, according to the Bisnos, requires us to overturn the trial court's decision. However, section 23.01 clearly did not require the Association to conduct an internal disciplinary proceeding before bringing the present court action. In relevant part, section 23.01 states: "Any dispute or question involving any action, omission, interpretation, application or enforcement of any of the provisions of this Declaration shall be determined promptly by the Board of Directors, who shall consider and weigh such written and such oral statements as may be submitted to the Board in connection therewith. Except with respect to a loss or forfeiture which may result from (i) a judgment or order of a Court of competent jurisdiction, or the ruling of any governmental agency having jurisdiction . . . the rights of the Association and/or the

Board of Directors to impose monetary penalties upon any Owner, suspend his voting rights or otherwise discipline any Owner by reason of any breach of or default by such Owner in compliance with the provisions of this Declaration . . . shall (in accordance with the provisions of Section 1792.25 of Title 10 of the California Code of Regulations and Section 7341 of the California Corporations Code) be exercised in good faith and in a fair and reasonable manner and shall require substantial compliance with the following: [¶] (i) Written notice to be given to any Owner against whom any discipline is to be taken or imposed [including a statement of reasons, provided at least 15 calendar days before the date of disciplinary action]. [¶] (ii) Not less than five (5) calendar days before the effective date of any such proposed disciplinary action, the Owner against whom such action is proposed to be taken shall be given an opportunity to be heard, orally or in writing, by the Board or other person or body authorized by the Board to decide whether or not the proposed disciplinary action is to be taken."

By its plain meaning, section 23.01 requires "substantial compliance" with the notice and hearing requirements only in instances in which the Board of Directors itself seeks to impose disciplinary action on a homeowner, as by imposing a monetary penalty or suspending voting rights. The internal notice and hearing requirements do not apply when the Board or Association, rather than imposing internal discipline, brings an action in court. Besides the plain meaning of the language used, we find further support for this conclusion by analogy to the doctrine of *noscitur a sociis,* under which the meaning of a word may be qualified by reference to the entire clause as a whole. (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460,

471, fn. 3.) The nature of the word "discipline" as used in section 23.01 is qualified by the specific examples preceding it – monetary penalties or suspension of voting rights – which are disciplinary penalties the Board may impose, and not the type of injunctive relief involved in the instant appeal. In addition, section 17.01 declares that, except for nonpayment of charges or assessments, "the remedy at law to recover damages [for any violation of the Declaration] is inadequate and the failure of any Owner . . . to comply [with the terms of the Declaration] . . . may be enjoined or specifically enforced by appropriate legal proceedings instituted by . . . the Association." This provision authorizing the Association to seek injunctive relief in court contains no mention of the internal hearing provisions of section 23.01, and cannot reasonably be construed to invoke them as preconditions to filing suit. Thus, the Bisnos were not entitled to a disciplinary hearing before the Association filed suit.

The Trial Court Did Not Abuse Its Discretion in Denying the Bisnos' Motion to Dismiss under section 1354, subdivision (b)

The Bisnos contend that the Association violated Civil Code section 1354, subdivision (b), by failing to pursue alternative dispute resolution before seeking injunctive relief. Therefore, the Bisnos argue that the injunction must be dissolved. We disagree.

As here relevant, Civil Code section 1354, subdivision (b), applies to a civil action brought to enforce the documents governing a common interest development, and seeking "solely . . . declaratory relief or injunctive relief, or . . . declaratory relief or injunctive relief in conjunction

with a claim for monetary damages . . . not in excess of . . . $5,000."[8] The subdivision requires that before filing such

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[8] Effective January 1, 2005, the Legislature amended Civil Code section 1354, and moved the alternative dispute resolution provisions, which it modified, to sections 1369.510 through 1369.590. (Stats. 2004, ch. 754, § 1.) We quote the relevant portions of the former statute, subdivisions (b) and (c), as they existed when the Association filed its action:

> "(b) Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, *not in excess of five thousand dollars ($5,000),* related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. . . . Parties receiving a Request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.
>
> "(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages not in excess of five thousand dollars ($5,000), related to the enforcement of the governing

(Continued on following page)

an action, "the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution," which may be binding or nonbinding at the parties' option. (Civ. Code, § 1354, subd. (b).) The statute provides that either party may serve on the other a "Request for Resolution," which must be accepted or rejected within 30 days, and if not accepted within 30 days is deemed rejected. (*Ibid.*)

Under section 1354, subdivision (c), "[a]t the time of filing a civil action [described in subd. (b)] . . . the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to

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documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parties to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties." (Italics added.)

the dispute refused alternative dispute resolution prior to the filing of the complaint, *that preliminary or temporary injunctive relief is necessary,* or that alternative dispute resolution is not required by subdivision (b), because the limitation period for bringing the action would have run within the 120-day period next following the filing of the action, *or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties."* (Italics added.)

The Association commenced the present case on June 5, 2002, by filing a complaint against defendant Jeannette Bisno alleging breach of covenants, nuisance, and trespass. The complaint sought, *inter alia,* a preliminary and permanent injunction, and damages "believed to be in excess of $5,000.00 and within the jurisdictional limit of this Court." The Association also filed a certification "that, in accordance with California Civil Code section 1354(c), preliminary or temporary injunctive relief is necessary to compel Jeannette A. Bisno to comply with the Association's governing documents."

The Association's complaint did not violate section 1354, subdivision (b). Because the complaint sought damages in excess of $5,000, subdivision (b) of section 1354 did not require an attempt at alternative dispute resolution before the Association commenced the action. Further, regardless of the damage amount sought, the complaint was accompanied by a certification under section 1354, subdivision (c), that preliminary or temporary injunctive relief was necessary. Hence, on this independent ground there was no need for the Association to certify that there had been an attempt at alternative dispute resolution.

The Association was initially successful in obtaining a preliminary injunction. However, the injunction was later dissolved pending trial. In August 2003 the court granted the Association leave to file a Supplemental Complaint, which supplemented the factual allegations of the initial complaint. Trial began on Monday, March 8, 2004. On the preceding Friday, the Association decided to forego its damage claims, and proceed solely on its claims for permanent injunctive relief. Although the Association believed it had suffered monetary damages, it had decided to waive its damage claims because of the difficulty in proving how much the community had been devalued as a result of defendants' conduct. On the first day of trial, the Bisnos moved under section 1354 to dismiss the complaint because the action now sought only injunctive relief, and the Association had failed to pursue alternative dispute resolution as contemplated by section 1354, subdivision (b).[9] The trial court denied the motion.

On appeal defendants' implicitly (though not expressly) challenge this ruling. They contend, in essence, that the Association acted in bad faith in coupling its injunctive claim with a sham claim for damages in excess of $5,000 so as to avoid the alternative dispute resolution requirement of section 1354, subdivision (b). Therefore, according to defendants, upon the Association's waiver of the damage claim shortly before trial, the trial court should have dismissed the action for failure to attempt

[9] The Bisnos have failed to include a copy of their motion and supporting documents in the record on appeal.

alternative dispute resolution. We find no abuse of discretion in the trial court's denial of defendant's motion to dismiss.

First, it is the failure to file a certificate under subdivision (c) of section 1354, not the failure to attempt informal resolution under subdivision (b), that invokes the court's power to strike the complaint, or otherwise dismiss it. Here, because the Association certified under subdivision (c) that preliminary or temporary injunctive relief was necessary, there was no need to certify completion of alternative dispute resolution, and, in turn, there was no basis under subdivision (c) for the trial court to strike or otherwise dismiss the complaint. Thus, whether the damage claim was brought in bad faith was irrelevant under section 1354; the certification of the need for preliminary or temporary injunctive relief precluded dismissal of the case.

Second, assuming *arguendo* the Bisnos might have been entitled to dismissal upon a showing the Association made its damage claim in bad faith, the Bisnos fail to cite any evidence in the record proving such bad faith. Although in the proceedings below the Bisnos' attorney referred to excerpts from the deposition of Christine Hazy, apparently cited in defendants' written motion, defendants have failed to make the motion and the supporting deposition testimony part of the record on appeal. Moreover, even if we accept trial counsel's characterization of that deposition testimony, it is insufficient to show that the Association acted in bad faith in alleging damages in excess of $5,000. The trial court could reasonably conclude that the Association believed in good faith that defendant's alleged violations of the covenants caused the community more than $5,000 in damages from the diminution in the

value of the community. The court could also reasonably conclude that the Association's decision shortly before trial not to pursue damages was simply a practical choice to simplify and streamline the trial.

Finally, section 1354, subdivision (c), permits the court to excuse the requirement of certifying compliance with subdivision (b) if "the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties." Given the efforts at mediation after the case had been filed, and the great expenditure of time and effort over the course of the litigation, the trial court could reasonably conclude, as argued in the trial court proceedings below by the Association's counsel, that dismissal would have substantially prejudiced the Association without serving the goals of the statute.

The Sculpture Was Not Impliedly Approved

The Bisnos contend that the ARC failed to rule on their plans calling for a "fountain and/or sculpture" within 45 days of submission. Therefore, under sections 25.03 and 25.07 of the Declaration, the plans for a sculpture or fountain must be deemed to have been approved. We disagree.

Section 25.03 provides in relevant part: "The ARC shall consider and act upon any and all plans and specifications submitted for its approval under this Declaration. . . . No construction, alteration, addition, installation, modification, decoration, redecoration or reconstruction of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced

until the plans and specifications therefor *showing the nature, kind, shape, height, width, color, materials and locations of the same shall have been submitted to the ARC and approved in writing by the ARC....* The ARC may require such detail in plans and specifications submitted for its review as it deems proper, including, without limitation, landscape plans, floor plans, site plans, drainage plans, elevation drawings (including but not limited to considerations with respect to the impairment of the applicant's or other Lot Owner's or adjacent Lot Owner's view) and description or samples of exterior materials and colors. Decisions of the ARC and the reasons therefore shall be transmitted by the ARC to the applicant ... within forty-five (45) days after receipt by the ARC of all materials required by the ARC. *Any application submitted pursuant to this Section 25.03 shall be deemed approved, unless written disapproval or a request for additional information or materials by the ARC shall have been transmitted to the applicant within forty-five (45) days after the date of receipt by the ARC of such application or additional information."* (Italics added.)

Section 25.07 additionally provides: "If *complete plans and specifications* are submitted as provided herein and the ARC fails to approve or disapprove the same within forty-five (45) days from receipt thereof by the ARC, the plans, specifications and drawings so submitted shall be deemed to have been approved in writing by the ARC." (Italics added.)

We find that the implied approval provisions of section 25.03 and 25.07 did not apply to the Bisnos' sculpture. Reasonably construed, the implied approval provisions of sections 25.03 and 25.07 do not apply unless complete plans for the improvement in issue – that is, plans "showing the

nature, kind, shape, height, width, color, materials and locations of the same" – have been submitted. Any contrary interpretation would render the description of the type of plans required in section 25.03, and the reference to "complete plans" in section 25.07, mere surplusage. The Bisnos fail to offer any real argument on the interpretation of sections 25.03 and 25.07.

The Association's evidence showed that complete plans for the sculpture were never submitted. Further, the Association had no opportunity to view the sculpture (or any depiction of it) before it was delivered to the job site in July 2002. Thereafter the ARC promptly inspected it, and disapproved it. The Bisnos' summary of the record in [sic] inaccurate. There is no "unequivocal" testimony that the Bisnos submitted plans showing a "fountain and/or sculpture" as early as February 18, 2001. There is no "uncontroverted" testimony that Robert Bisno and Daniel Weedon showed a photograph of the sculpture to the ARC before the submission of plans showing a "fountain and/or sculpture." None of the Bisnos' citations to the record support these assertions. Indeed, Daniel Weedon testified that before the sculpture was delivered he did not present a photograph to the ARC, and he did not know whether the ARC had a chance to see a photograph of the sculpture before that time. He further testified that it was possible he and Robert Bisno showed a photograph to the ARC after July 2002. Substantial evidence clearly supports the trial court's finding that the implied approval provisions of sections 25.03 and 25.07 did not apply to the Bisnos' sculpture.

ARC Approval of the Sculpture Was Required

The Bisnos' contend that the sculpture is not an "Improvement" within the meaning of the Declaration, and therefore the ARC had no jurisdiction over it. We find that the Bisnos have waived the contention. The issue was not raised in the Bisnos' opening statement at trial. The Bisnos have provided us with no record showing that this claim was made at any other time at trial, as in trial briefing or argument. The only mention of the issue in the appellate record occurs in the Bisnos' Request for a Statement of Decision. That request was made after the trial court issued its Statement of Intended Decision. True, at trial Robert Bisno testified that he decided to install the sculpture without ARC approval, because (based on conversations with counsel) he believed that the ARC did not have jurisdiction over it. However, that testimony is not adequate to show that the Bisnos articulated a coherent argument that ARC approval was not required. Having failed to adequately articulate the argument at trial, and thus having deprived the Association and the trial court of a fair opportunity to address it, the Bisnos have waived the right to assert it on appeal. (See generally *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960.)

Assuming *arguendo* that the Bisnos did not waive the argument, we are not persuaded on the merits. Section 25.03 of the Declaration provides in relevant part that "[n]o . . . decoration [or] redecoration . . . of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary shall be commenced until" the ARC approves the plans. Section 1.21 defines "Improvement" in part as "any structure or appurtenance thereto of every type and kind, including, but not limited to, buildings, . . .

driveways, parking areas, ... and landscaping of all Landscape Categories."

The plain meaning of sections 25.03 and 1.21 shows that the ARC has jurisdiction over the sculpture. As a building, the Bisnos' home is an "Improvement" within the meaning of section 1.21. Further, as a driveway and parking area, the motor court is likewise an "Improvement." Under section 25.03, any "decoration ... of any exterior of an Improvement, or any other portion of an Improvement (including landscaping) which is visible from outside the Residential Lot boundary" must be approved by the ARC. The sculpture qualifies as "decoration" of the exterior of the home, and a "decoration" of the motor court. Indeed, it was the beauty and scale of the five-ton sculpture, and its theme of welcoming visitors to the home, that led Robert Bisno to decide to install it. Thus, section 25.03 clearly gave the ARC jurisdiction over the sculpture.

The trial evidence supports such an interpretation. The Association's evidence showed that section 25.03 has always been construed by the ARC and homeowners as requiring approval for statuary visible from the street. Indeed, defense witness Daniel Weedon, who had performed design work for 11 homeowners in North Beverly Park, believed that ARC approval was required for the sculpture, as did Randy Hamerly. Such evidence supports an interpretation of sections 25.03 and 1.21 that gives the ARC jurisdiction over the sculpture. In short, even if we assume for the sake of argument that the Bisnos did not waive the argument, it is clear that the ARC has jurisdiction over the sculpture.

DISPOSITION

For the foregoing reasons, the judgment is affirmed. The Association is entitled to its costs on appeal.

NOT TO BE PUBLISHED

WILLHITE, JR., J.

We concur:

EPSTEIN, P.J.

CURRY, J.